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IN THE

Supreme Court of the United States

APRIL TERM, 1949

No. 756

ESTATE OF THEODORE F. MacMANUS, Deceased,
UNION GUARDIAN TRUST COMPANY, Executor,
DETROIT TRUST COMPANY, Successor,
ALICE H. MacMANUS, Executor and
JOHN R. MacMANUS, Executor,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Estate of Theodore F. Mac Manus, Deceased, Union Guardian Trust Company, Executor, Detroit Trust Company, Successor, Alice H. Mac Manus, Executor and John R. Mac Manus, Executor, respectfully pray that a Writ of

Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cause on January 23, 1949.

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 21) is reported in 8 T. C. No. 40. The opinion in *Mac Manus v. Commissioner* is reported in 131 Fed. (2d) 670. The opinion in the instant case (end of record) is reported in 172 Fed. (2d) 697. The opinion in the last named case and judgment thereon were entered January 31, 1949.

JURISDICTION

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

SUMMARY STATEMENT OF MATTER INVOLVED

On July 18, 1923, Theodore Mac Manus created six trusts amended in 1924 which because of deaths of two beneficiaries were later resolved into four trusts. The donor retained the right to change the beneficiary in each trust to another within a limited family class (R. 49, 52).

Certain documents were executed on, to-wit, May 10, 1934, by virtue of which petitioners herein contend that the trusts above referred to were terminated. The documents were caused to be prepared by the donor and approved by him (R. 86) and they were concurrently executed (R. 44, 45).

Decedent and the Detroit Trust Company, trustee, executed three instruments, one for each trust other than the trust for John R. Mac Manus, all identical, except for the name of the beneficiaries by which the decedent under the power reserved in the trusts, changed the several beneficiaries to John, thus making John the sole *cestui qui trust.* Joint Exhibit E-5 (R. 44, 58).

Concurrently, decedent, his wife, his son John, sole beneficiary in all four trusts, and the trustee, comprising all the parties in interest, executed a release and discharge of the trustee's obligations and a transfer of the trust estate. Joint Exhibit F-6 (R. 60). This agreement recites the vesting of all beneficial interest in the trusts in John, and that all interested parties have determined that the corpus of the trust estate shall be assigned to John, recites the prior agreements and provides that "all the *rights, powers, benefits,* and *interests* in and to said agreement and supplements, *and in and to the trust estate* covered thereby, shall be and *hereby are transferred and assigned to John R. Mac Manus.* * * *"

John R. Mac Manus then executed a trust declaration, Joint Exhibit E-4 (R. 56). It recites the purpose of the decedent to make him, John, the sole beneficiary and that the purpose thereof "*is to facilitate a termination thereof by unanimous consent* * * * *so that the trusts may be continued in broader form.* * * *" It defines in detail his powers and duties, among them "I shall be responsible only for the exercise of good faith and to account to the four (4) beneficiaries named above." It provides for termination of the trust upon the death of the survivor of decedent and his wife, and for distribution on termination to the beneficiaries if living, or otherwise to their respective distributees.

The petitioners here filed a petition with the United States Tax Court for redetermination of an alleged deficiency in the estate tax liability of the Estate of Theodore Mac Manus, deceased. They conceded that under the four trusts of July 18, 1923, as amended on December 30, 1924, the decedent had retained a power to change the beneficiaries of the trusts, but contended that, pursuant to the transactions between the decedent donor, the trustee, and the sole beneficiary, this power was extinguished.

The Tax Court held against this contention, and determined a deficiency in estate tax of $59,143.85, 8 T. C. No. 40, (Findings of Fact and Opinion, February 18, 1947, R. 21) upon grounds stated as follows:

> "Under facts practically identical with those now before us, this precise question was considered by the Circuit Court of Appeals for the Sixth Circuit in *Mac Manus et al. v. Commissioner*, 131 Fed. (2d) 670, reversing the decision of the Board of Tax Appeals at 44 B. T. A. 508. *The issue in that case, involving income taxes, was whether the petitioner, John R. Mac Manus was a trustee in four separate trusts or in a single trust* with multiple beneficiaries.
>
> "There the court, for whose opinions we have great respect, held that there were four independent trusts * * * (R. 36, 37).
>
> "* * * The court proceeded to discuss the effect of the use of the singular and plural reference to the trusts as affecting the problem immediately under its consideration and added:
>
> 'It thus will be seen that in the declaration of the trustee, there is a clear recognition of the purpose of Theodore F. Mac Manus to continue the existing trusts with but one change, and that in the name of the trustee, and that the predominant thought throughout the instrument is that there are four trusts and not one * * *.'

> *"Thus the controversy basic to the issue here has been decided by the Circuit Court of Appeals"* (R. 38). (Italics supplied.)

In sum, the Tax Court rests decision on the principle of *res judicata.* It does not assume to reach any conclusion upon the issue independently and free from the assumed controlling effect of the decision of the Circuit Court of Appeals in the income tax case in which the issue simply was whether there were four trusts or one.

On petition to review in the Circuit Court of Appeals for the Sixth Circuit, this ruling was affirmed by a divided court, 172 Fed. 2d, 697, decided January 31, 1949. The ground of this determination as stated in the majority opinion is as follows:

> *"We are of the opinion that the ruling in this case is controlled by the prior decision of this Court* in *Mac Manus v. Commissioner,* 131 Fed. (2d) 670.
>
> "In that case we construed the same trusts set up by the instruments of July 18, 1923, December 30, 1924, May 9, 1934, and May 10, 1934 and, with respect to the income tax question involved in that case, held that the four separate and independent trusts originally set up by Theodore F. Mac Manus had not become merged into a single trust with multiple beneficiaries, but continued to exist as separate trusts with a change from the Detroit Trust Company as trustee to John R. Mac Manus trustee. The reasons which led us to that conclusion are fully stated in the opinion in that case and need not be restated here. We adhere to that ruling. We agree with petitioner that that decision is *not res judicata* of the present controversy, in that the issues are not the same and because certain additional facts bearing on the different issue herein involved are presented and must be considered. *But our construction of the legal effect upon the trusts created and affected by the four instruments referred to, re-*

> *gardless of the phase of taxation which may be under consideration in any given controversy, is controlling and should be followed.*" (Italics supplied.)

Referring to the opinion in the prior case, the court pointed out the statement therein that the decedent's sole purpose was a change of trustee and that his purpose was to continue the existing trust with but one change, and that, in the name of the trustee, and then concluded that

> "if the change in the trustee was the sole change intended by the grantor, it follows that the reservation of power in the grantor to change the beneficiaries which existed in the original trusts continued to exist in the same trust after the change of trustee made effective by the instruments of May 9 and May 10, 1934."

In sum, the court below merely applied as controlling, its characterization of decedent's intent as containing solely the purpose of changing the trustee, and closed its mind—accorded, in effect, no hearing—to the jural acts of the decedent which were in evidence and under which the petitioner claimed decedent's power to change beneficiaries had become extinguished.

Such further consideration as the majority of the court gave to the case was expressly "because certain additional facts bearing on the different issue herein involved are presented and must be considered." But it clearly appears that the controlling effect of the statement *arguendo* in the previous opinion that decedent's sole purpose was to effect a change of trustee, engulfs the consideration, so that it may fairly be said that in the Appellate Court, just as in the Tax Court, the petitioner did not get a hearing upon the merits, but was precluded because a previous opinion was taken as fulfilling the law in respect to the case and not one jot or tittle could be altered.

QUESTIONS PRESENTED

1. Whether the ruling on petitioner's claim that the trust estate is taxable to decedent's estate, because the right to change the beneficiary was reserved, was controlled by a statement that decedent's sole purpose was a change of trustee contained in the prior opinion of the United States Court of Appeals for the Sixth Circuit which, with respect to the income tax question involved in that case, held that the four separate and independent trusts originally set up by Theodore F. Mac Manus had not become merged into a single trust with multiple beneficiaries.

2. Whether a power to change beneficiaries contained in an instrument of trust is extinguished under the following conditions: (a) The grantor, under the power, consolidates all beneficial interest in a single beneficiary for the declared purpose of facilitating a termination of the trust; (b) the trustee, the beneficiary, and the grantor join in an instrument in which the trustee conveys the trust property to the beneficiary, is released from its obligations as trustee under the original trust agreement and all supplements thereto, and all *rights, powers,* and benefits are assigned to the *cestui,* and all *rights* and *obligations* of the trustee shall cease and terminate; (c) the assignee makes a written declaration of trust on its face completely stating the beneficiaries and their rights, and his duties as trustee, wholly without reference to any provision of the original trust specifying rights and duties, and containing no power to change beneficiaries or any reference thereto.

REASONS FOR GRANTING THE WRIT

1. The doctrine that a factual statement in a prior opinion is controlling upon different issues passes far beyond the usual conception of *stare decisis* and raises a question of great public importance.

2. The misapplication of the rule of preclusion is in effect a departure from the accepted course of judicial proceedings and has effectually deprived petitioner of the hearing and consideration which should be available and would have been accorded if the majority had not deemed the case already determined, and calls for an exercise of the Court's power of supervision.

3. Important questions of local law were decided in a way probably untenable. The Court decided that trusts were not extinguished by a merger of the legal and equitable estates. It further decided that a declaration of trust, completely and explicitly defining the terms of beneficiaries and not ambiguous, should, by construction—not reformation—be deemed to include a reservation to the grantor of a power to change beneficiaries, as to which there was no expression whatsoever in the instrument.

BRIEF IN SUPPORT OF APPLICATION

I.

THE ENLARGEMENT OF THE SCOPE OF STARE DECISIS BY THE DECISION BELOW RAISES A QUESTION OF GREAT PUBLIC IMPORTANCE AND IS CONTRARY TO THE DECISIONS OF THIS COURT

In the prior case, the Court was able to find that there was no intention on the part of the grantor to convert the four independent trusts into a single one. This was the sole issue. By way of incidental statement in the opinion, it was said that the decedent's sole purpose was to change the trustee. This statement is now taken as the definitive binding construction of the transaction of May 10, 1934.

In so doing, the Court extends the doctrine of *stare decisis* to a statement of fact not actually necessary to the decision in which it appears, and written wholly without reference to other possible issues of subsequent litigation. Relative to the objects to be attained in the construction to be made, the language was perhaps apt and adequate taken in connection with the context. When it is torn out of the context and given an absolute significance, it represents an extension of the principle of *stare decisis*, which presents a question of grave importance.

Stare decisis deals with rules and principles of law.
2 Freeman on Judgment, 5 Ed., 1329.

This Court has often admonished that the language of opinions is restricted in application to the facts of the case, and should not be extended for any purpose of authority in another and different case. *Cohens v. Virginia*, 6 Wheat. 264; *Wright v. Nagle*, 101 U. S. 791; *German Alliance In-*

surance Co. v. Home Water Supply Co., 226 U. S. 220, 234; *Sterling v. Constantin*, 287 U. S. 378, 400; *Humphrey's Executor v. United States*, 295 U. S. 602, 627; *Puerto Rico v. Shell Co.*, 302 U. S. 253, 269.

For example, the use of the terms "necessary" or "indispensable element" cannot be literally applied to cases of different circumstances. *Armour & Co. v. Wantock*, 323 U. S. 126, 131.

In tax cases of consequence involving trusts, there are bound to be numbers of transactions like the present in which instruments may be construed with respect to certain issues involving income taxes and may again be construed in the light of some other object involving estate taxes. It would be utterly impossible to anticipate the kind of question which might subsequently arise. It would be an over-refinement of art, of not impossible, to write an opinion which could comprehend all the aspects of the documents or transactions relating to the possible issues. But this case announces a rule that the incidental statements made by the Court in its opinion relating to the construction of a transaction are to be accepted as law in any subsequent litigation in which a construction in relation to entirely distinct issues needs to be made. We think it a most important matter to determine whether in such instances litigants are to be precluded by decisions in which the issues before the Court were never even considered.

II.

THE EFFECT OF THE DECISION BELOW WAS TO PRECLUDE A HEARING AS TO SO MUCH OF THE EVIDENCE AS WAS CONSIDERED IN THE PRIOR CASE

Unless the decision of the Court below is right, the petitioner was actually denied a full and adequate hearing both in the Tax Court and in the Court of Appeals. The Tax Court regarded the issues before it as decided. The Court of Appeals regarded itself as controlled by the prior opinion and gave consideration only to the independent effect of new evidence. Of course, this was done judicially, but if it was error, as we contend, it had the effect of precluding an independent construction of the documents and the transaction with reference to the different issues.

With respect to the prior issue, the Court regarded the transaction as ambiguous and admitted for purposes of interpretation extrinsic evidence of the decedent's state of mind at a prior time. It was from this evidence that the statement of decedent's sole purpose arose. It should certainly be open to the petitioner on the new issues to contend that there is no ambiguity and that extrinsic evidence of prior intent may not be heard. In short, an independent hearing was accorded only by the dissenting Judge, and his opinion constitutes an adequate argument for our contentions.

III.

THE ACTUAL RESULT OF THE DETERMINATION IS TO DECIDE IN A MANNER PROBABLY UNTENABLE IMPORTANT MATTERS OF THE LAW OF TRUSTS AND OF THE INTERPRETATION OF LEGAL ACTS

It is fundamental that a merger of the legal and equitable estates extinguishes a trust. *Langley v. Conlon,* 212 Mass. 135; *Restatement Law of Trusts,* Sec. 341. The power of appointment would be extinguished as well.

John Mac Manus's trust declaration is a legal act which itself embodies its effective intent. It is complete and for present purposes unambiguous. It states the terms of the trust. It does not contain a power to change beneficiaries. It does not adopt by reference the previous trust declaration. See *3 Scott on Trusts,* Sec. 332.

What the Court did was to disregard a fundamental proposition of law to the effect that the governing intent is to be determined from the instrument itself. It gives support to the spurious idea that instruments are to be construed so as to carry out intentions for which the author's mind may be searched by an investigation of his prior utterances.

While, of course, the point is obvious, it is nonetheless fundamental.

CONCLUSION

We respectfully submit that this Honorable Court should issue the Writ of Certiorari as prayed.

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April 27, 1949.

OPPOSITION

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 756

ESTATE OF THEODORE F. MACMANUS, DECEASED, UNION GUARDIAN TRUST COMPANY, EXECUTOR, DETROIT TRUST COMPANY, SUCCESSOR, ALICE H. MACMANUS, EXECUTOR, AND JOHN R. MACMANUS, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 21-42) is reported at 8 T.C. 330. The opinion of the Court of Appeals (R. 122-144) is reported at 172 F. 2d 697.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1949 [1] (R. 121). The petition for a writ of certiorari was filed on April 30, 1949. The jurisdiction of this Court is properly invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the grantor of four trusts for the benefit of his four children, respectively, retained until the time of his death the power to change the beneficiaries so that the value of the corpus of each of the trusts is includible in his gross estate for purposes of federal estate tax under Section 811 (c) or (d) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The statute and Regulations involved will be found in the Appendix, *infra*, pp. 9-14.

STATEMENT

The facts, as found by the Tax Court (R. 22-36), may be summarized as follows:

In 1923 Theodore F. MacManus created revocable trusts, identical in form, for each of his six children, naming the Detroit Trust Company as the trustee of each trust (R. 22). In 1924 the grantor amended the trust instruments to surrender his right of revocation, but expressly reserved a right to add or substitute as a beneficiary

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[1] The taxpayer inadvertently states that the judgment was entered on January 23, 1949. (Pet. 2.)

any person bearing a specified relationship to the named beneficiaries. Two of the beneficiaries died, in 1930 and 1932, and the assets of the trusts created for their benefit were, under the terms of the trusts, distributed to their heirs at law (R. 24-25).

In the early 1930's the grantor, becoming dissatisfied with the Trust Company's management of the property, resolved to make his son, John, the trustee. On May 10, 1934, in order to achieve this end, he appointed John the sole beneficiary.[2] John executed a declaration of trust which recited in substance that the purpose of the change in beneficiaries was to facilitate the rehabilitation of the trusts and the change of trustees and that he, John, would as trustee hold the trust property for the four original beneficiaries (R. 26-28). A day later, on May 11, 1934, John, as beneficiary, Theodore F. MacManus as maker, together with his wife, and the Detroit Trust Company as trustee, executed an instrument styled "Release and Consent to Transfer Corpus of Trust Estate and Discharge of Trustee's Obligations" which referred to the original trusts, the amendments of December 30, 1924, and May 10, 1934, the decision of the parties in interest that the corpus of the trust estate as

---

[2] The grantor appears to have adopted the device of making John the sole beneficiary in order to avoid difficulties in the securing of releases and consents which would otherwise have arisen from the fact that two of the beneficiaries resided at a distance and another was a minor (R. 34-35).

held by the Detroit Trust Company as trustee should be transferred to John and all of the duties and responsibilities of the Detroit Trust Company as trustee should cease and terminate, and by which John R. MacManus, Theodore F. MacManus and his wife, being all of the parties having a present interest in the corpus of the trust estate, acknowledged the receipt and delivery of all the property and assets constituting the corpus of the trust estate and the income thereon. (R. 60-61.) The closing paragraph stated that it was agreed that the Detroit Trust Company as trustee was thereby discharged and released from any and all obligation of every nature growing out of the trust agreements and amendments thereto, and that all of the rights, powers, benefits and interest in the trust estate (R. 61)—

> shall be and hereby are transferred and assigned to John R. MacManus, and in all respects, insofar as the Detroit Trust Company, as Trustee, is concerned, said agreements and/or supplements, and/or all right, title, interest, obligation, responsibility and liability with respect thereto and/or the corpus of the Trust Estate covered thereby, including all accumulations thereto, shall hereby cease and terminate, and the said Theodore F. MacManus, Alice Holdridge MacManus and John R. MacManus agree, and do hereby indemnify the said Detroit Trust Company, as Trustee, from any and all liability in connection therewith.

On December 29, 1937, one of the beneficiaries assigned all of her interest in the trust estate to her sister and two brothers, and thereafter filed a gift tax return covering such transfer and paid a gift tax thereon in the amount of $1,970.59. No claim for refund of this tax was ever filed and no refund has been made. (R. 28-29.) On two occasions after the change of trustees the grantor stated to insurance companies, in connection with the trustee's purchase of annuity contracts based on the grantor's life, that he had "no interest" in the trusts. (R. 29-30.)

After the change in trustees, a dispute, involving income taxes for 1935, arose between the trustee and the Commissioner. The Commissioner contended that as a result of the 1934 changes John R. MacManus had become trustee of a single trust with multiple beneficiaries. But the taxpayer argued, and the Court of Appeals for the Sixth Circuit found, after analyzing the same instruments as are here concerned, that the grantor's "sole purpose" had been to change the trustee and that the four separate trusts created in 1923 continued to exist unchanged after 1934. *MacManus* v. *Commissioner,* 131 F. 2d 670, 673 (C. A. 6).

Theodore F. MacManus died on September 12, 1940. (R. 33.) In determining the tax on his estate, the Commissioner included therein the corpus of the trusts for the benefit of the decedent's children. The Tax Court held that, since the decedent had

retained the power to change the beneficiaries of the trust, the value of the trust corpus was properly includible in his gross estate under the provisions of Section 811(c) of the Internal Revenue Code.[3] (R. 36-42.) The Court of Appeals, one judge dissenting, affirmed the decision of the Tax Court. (R. 122-144.)

ARGUMENT

The principal question in the case is whether the grantor, by the change in the trusts which he effected in 1934, did or did not intend to abandon the power to change the beneficiaries which he had previously reserved to himself.[4] The Tax Court and the Court of Appeals found that he did not.

---

[3] The Commissioner had ruled the trust corpus includible "under the provisions of section 811(c) and/or section 811(d) of the Internal Revenue Code." (R. 36.) The former section applies to any transfer under which the transferor has retained "the right . . . to designate the persons who shall possess or enjoy the property or the income therefrom"; the latter to a transfer "where the enjoyment thereof was subject at the date of [the transferor's] death to any change through the exercise of a power . . . to alter, amend, or revoke . . ." It seems clear that if the decedent in the instant case retained the power to change beneficiaries, either of these sections would be applicable; and it matters little which one is thought to be the more precisely in point.

[4] In the courts below the respondent presented alternative grounds on which to support the determination that the trust property was includible in the decedent's gross estate: that there was a transfer in contemplation of death, within the meaning of Section 811(c) of the Internal Revenue Code (Appendix, *infra*) or a relinquishment by the decedent of his reserved powers in contemplation of death, within the scope of Section 811(d)(2); and that the decedent retained until he died the enjoyment of the trust property, within the scope of Section 811(c). The finding of the courts below with respect to the decedent's retention of the power to change beneficiaries made it unnecessary for them to pass on these contentions.

This finding was based upon careful consideration of the "Release and Consent to Transfer Corpus of Trust Estate and Discharge of Trustee's Obligations," and the other instruments executed in connection with the 1934 transaction. The court below likewise weighed various facts which, assuming an ambiguity in the instruments, were adduced as evidence of the grantor's intent, and found nothing in them inconsistent with the construction which it placed upon the instruments. The record fully supports the lower courts' conclusion, and there is no reason for further review.

The petitioner contends that the Court of Appeals, in reliance upon its decision in the income tax case, "closed its mind—accorded, in effect, no hearing—to the jural acts of the decedent which were in evidence." (Pet. 6.) But examination of the opinion of the court below shows plainly that it accorded to its opinion in the former case only that weight to which it was properly entitled. To be sure, in the earlier case the court had construed the same "jural acts" of the decedent which were presented here, and had decided that the grantor intended the trusts originally created to continue in existence, without alteration other than the change of trustees. But the court explicitly recognized that the matter was not *res judicata* and binding on the issue now raised (R. 125); it proceeded at some length to consider, in the light of the new issue, not only the additional facts presented by the petitioner but also the same documents which it

had previously construed. (R. 126-127.) That the court below upon fresh appraisal of the evidence, old and new, reached a conclusion consistent with that in the former case does not mean, as petitioner asserts, that he "did not get a hearing upon the merits." (Pet. 6.)

CONCLUSION

The decision below rests upon the particular facts of the case and is correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY, 1949.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been

made in contemplation of death within the meaning of this subchapter;

(d) *Revocable Transfers*—

* * * * *

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.15. *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: * * * (4) transfers under which the decedent retained the right, either alone or in conjunction with another person or persons, to designate who should possess or enjoy the property or

the income therefrom (see section 81.19); and (5) transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or where such a power was relinquished in contemplation of decedent's death (see sections 81.20 and 81.21).

* * * * *

SEC. 81.19. *Transfers with right retained to designate who shall possess or enjoy.*—The Internal Revenue Code (section 811 (c)) provides that, except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate shall embrace all property transferred by the decedent, whether in trust or otherwise, if there is retained by or reserved to him for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period, or for a period not ascertainable without reference to his death, the right either alone or in conjunction with any other person or persons to designate the person or persons who shall possess or enjoy the transferred property, or the income thereof.

This provision of the Internal Revenue Code covers, in the main, transfers to which also apply the provisions of certain other subsections of section 811. Thus, to the extent that

the enjoyment of the transferred property is subject to any change through the exercise of a power by the decedent alone or in conjunction with any other person or persons to alter, amend, revoke, or terminate, the provisions of section 811 (d) and of section 81.20 will apply. * * *.

A transfer of the kind dealt with in this section, when not also falling within the provisions of some other subsection of section 811, requires the inclusion of the transferred property within the gross estate, if the transfer was made—

(1) At any time after 10:30 p.m., eastern standard time, March 3, 1931, and the right to so designate was retained by or reserved to the decedent alone for his life, or for such period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p.m., eastern standard time, June 6, 1932, and the right to so designate was retained by or reserved to the decedent alone or in conjunction with any other person or persons for decedent's life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period, or for any period not ascertainable without reference to his death.

If the retention or reservation of the right described pertains to a part only of the trans-

ferred property, or to a part only of the income therefrom, then only a corresponding proportion of the value of the transferred property is includible in determining the value of the gross estate.

The right to so designate will be treated as having been retained or reserved if at the time of the transfer there was an understanding, either expressed or implied, that such right would later be created or conferred.

(See section 81.15.)

SEC. 81.20. *Transfers with power to change the enjoyment.*—(a) *Transfers included.*—Subsection (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See section 81.15.)

* * * * *

(b) *Taxability.*—The property or any interest therein transferred as described in subsection (a) shall be included in the gross estate if it comes within any one of the following paragraphs:

* * * * *

(2) If the transfer was made after the enactment of the Revenue Act of 1924 (4:01 p.m., eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936), and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

* * * * *

As used in this and in the next succeeding section, the expression "reserved at the time of the transfer" refers to a power to which the transfer was subject when made, whether the power arose by implication of law or by the express terms of the instrument of transfer, and which continued to the date of decedent's death (see the paragraph next following as to the conditions under which the power will be considered as existent at decedent's death) to be exercisable by decedent alone or by him in conjunction with some other person or persons, and includes any understanding, expressed or implied, had in connection with the making of the transfer that the power should later be created or conferred.

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